

FILED BY CLERK

MAR 26 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Respondent,

v.

DANIEL LEE BAKER,

Petitioner.

)
)
) 2 CA-CR 2009-0388-PR
) DEPARTMENT B

) MEMORANDUM DECISION
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042647

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Daniel Lee Baker

Phoenix
In Propria Persona

B R A M M E R, Judge.

¶1 Daniel Lee Baker petitions this court for review of the trial court's order summarily dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We review a trial court's ruling on a petition for post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 Following a jury trial in January 2005, Baker was convicted of aggravated driving while under the influence of an intoxicant (DUI) while his license was suspended,

revoked or restricted; aggravated driving with an alcohol concentration (AC) of .08 or greater while his license was suspended, revoked or restricted; aggravated DUI with two or more prior DUI convictions within the sixty months preceding the offense; aggravated DUI with an AC of .08 or greater with two or more prior DUI convictions during the sixty months preceding the offense; and criminal damage. After a bench trial on the state's allegation of prior felony convictions, the trial court found Baker had four aggravated DUI convictions in CR 2004-0488 and two aggravated DUI convictions in CR 2004-0490. The court sentenced him to concurrent, enhanced, presumptive prison terms of ten years for the DUI convictions and five years for the criminal damage conviction, to be served concurrently with the sentences imposed in CR 2004-0490, but consecutively to the terms in CR 2004-0488.

¶3 Thereafter, Baker filed a notice of appeal. Appointed appellate counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), raising no arguable issues. Baker filed an extensive supplemental brief. We affirmed his convictions and sentences. *State v. Baker*, No. 2 CA-CR 2005-0066 (memorandum decision filed Feb. 15, 2007).

¶4 Baker then filed a notice of post-conviction relief. Newly appointed counsel filed a notice asserting he had reviewed the record thoroughly and found no basis on which to assert a claim for post-conviction relief. Baker filed a petition for post-conviction relief in propria persona, asserting the following: (1) his trial and appellate counsel had been ineffective; (2) newly discovered evidence demonstrated he was

incompetent at the time of trial; and (3) his trial offended due process in violation of the Arizona and United States constitutions.

¶5 In its response, the state attached, inter alia, an affidavit from trial counsel in which counsel stated he had considered moving for a psychological evaluation pursuant to Rule 11, Ariz. R. Crim. P., but, after communicating with Baker on numerous occasions, he had not believed reasonable grounds had existed to make such a motion in good faith. The state also attached an affidavit from appellate counsel in which counsel asserted that, although Baker had urged her to argue he was incompetent to stand trial, “nothing before the trial court . . . [had] support[ed] any appellate claims of mental incompetence or diminished capacity.”

¶6 The trial court summarily denied Baker’s petition, concluding in accordance with Rule 32.6(c), Ariz. R. Crim. P., that Baker had “failed to present a material issue of fact or law which would entitle him to an evidentiary hearing, and that he ha[d] failed to state a colorable claim for relief on any basis.” This petition for review followed.¹ We grant review of Baker’s petition, but deny relief.²

¹The trial court ordered Baker to file his petition for review by November 30, 2009. Although his petition was filed on December 4, 2009, it was delivered timely for mailing on November 25, 2009, in accordance with the rule announced in *State v. Rosario*, 195 Ariz. 264, ¶ 10, 987 P.2d 226, 228 (App. 1999).

²Baker attempts to incorporate by reference arguments made in his petition for review from CR 2004-0490. Such incorporation is prohibited pursuant to Rule 32.9(c)(1)(iv), Ariz. R. Crim. P. Moreover, we recently granted review of that petition and denied relief. *State v. Baker*, No. 2 CA-CR 2009-0276-PR (memorandum decision filed Feb. 25, 2010).

¶7 Baker first asserts the trial court abused its discretion by summarily dismissing his claim that trial and appellate counsel were ineffective in that trial counsel had failed to request a mental competency evaluation pursuant to Rule 11, and appellate counsel had failed to assert Baker's incompetence or trial counsel's alleged ineffectiveness on appeal. He also contends, as he did below, that newly discovered evidence demonstrated he was incompetent at the time of trial.

¶8 In a thorough, well-reasoned decision that is supported by the record, the trial court correctly concluded Baker had failed to present a colorable claim on these issues. "No useful purpose would be served by this court rehashing the trial court's correct ruling in a written decision." *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Thus, we adopt its reasoning and find no abuse of discretion in the court's summary dismissal of these claims.

¶9 In concluding Baker's ineffective assistance claims were not colorable, the trial court relied in part on the affidavits of trial and appellate counsel attached to the state's response. Baker argues these affidavits were hearsay and the court's reliance on them violated his rights under the confrontation clause of the Sixth Amendment.

¶10 Baker misunderstands the nature of post-conviction relief proceedings. A defendant is entitled to an evidentiary hearing, in which he may confront adverse witnesses, only if he presents a colorable claim in his petition for post-conviction relief. *See State v. Jeffers*, 135 Ariz. 404, 427, 661 P.2d 1105, 1128 (1983); *see also* Ariz. R. Crim. P. 32.6(c) (providing for summary disposition of petitions not presenting material

issue of fact or law); Ariz. R. Crim. P. 32.8(a) (defendant entitled to evidentiary hearing on issues of material fact “with the right to be present and subpoena witnesses”). In its response to a defendant’s petition, the state may attach affidavits contradicting the petitioner’s allegations. Ariz. R. Crim. P. 32.6(a). A trial court is entitled to rely on those affidavits when determining whether the defendant has presented a colorable claim. *See* Ariz. R. Crim. P. 32.6(c) (trial court shall review “petition, response, reply, files and records” to determine whether claims precluded or present material issue of fact or law). The trial court properly considered the affidavits of trial and appellate counsel to determine Baker had failed to present colorable claims that they had provided ineffective assistance.

¶11 Next, Baker contends he was entitled to relief because his trial counsel was ineffective in failing to request a mitigation hearing before sentencing. But Baker failed to cite any authority for this argument below. *See* Ariz. R. Crim. P. 32.5 (“Legal and record citations and memoranda of points and authorities are required.”). And he did not assert what he would have presented in mitigation; he merely concluded that, had a mitigation hearing been conducted, he would have received a more lenient sentence. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (“To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.”). Baker similarly fails to develop his argument in his petition for review. *See* Ariz. R. Crim. P. 32.9(c)(1)(iv) (petition for review “shall contain . . .

reasons why the petition should be granted”). He therefore has waived the claim. *Cf.* Ariz. R. Crim. P. 31.13(c)(vi) (appellate brief argument shall contain appellant’s contentions and reasons therefor); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal).

¶12 Baker additionally argues that, because he was incompetent at the time of trial, his trial offended due process in violation of the United States and Arizona constitutions. *See* U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 4. Baker raised this argument on appeal, and we concluded “the record on appeal does not support Baker’s claim [he was incompetent]” *Baker*, No. 2 CA-CR 2005-0066, ¶ 5. Thus, he was precluded from securing post-conviction relief on this ground. *See* Ariz. R. Crim. P. 32.2(a)(1)-(2).

¶13 Baker also argues he was sentenced improperly, contending he was entitled to have the jury determine his sentence, the trial court sentenced him to more than two years’ imprisonment in violation of A.R.S. § 28-1383(H)(2), and he was sentenced to serve eighty-five percent of his prison term as if he had been adjudicated a violent offender. These claims were either raised or raisable on appeal, and Baker therefore is precluded from obtaining relief on these grounds. *See* Ariz. R. Crim. P. 32.2(a)(1)-(2); *Baker*, No. 2 CA-CR 2005-0066, ¶ 10.

¶14 Last, Baker contends the trial court deprived him of due process and caused him to suffer prejudice “by refusing to address pleadings,” namely, his motion to dismiss with prejudice. After filing his petition for post-conviction relief, but before the trial

court issued its ruling, Baker moved to have his case dismissed with prejudice. He asserted dismissal was appropriate because he had not received the grand jury transcript, which he had requested and had needed to draft his petition for post-conviction relief.

¶15 Thereafter, Baker’s counsel, appointed for the post-conviction proceedings, sent Baker the transcript. Baker did not then move to file a supplemental petition. *See* Ariz. R. Crim. P. 32.6(d). Nor does he assert on review that anything in the grand jury transcript would have entitled him to post-conviction relief. Notably, Baker had asserted on appeal that he had been denied due process because he had not received the grand jury transcript. We concluded his grand jury challenges were “untimely and rendered moot by the convictions.” *Baker*, No. 2 CA-CR 2005-0066, ¶ 2. The trial court effectively denied Baker’s motion to dismiss when it summarily dismissed his petition for post-conviction relief. This was not error. His claims were precluded in any event. *See* Ariz. R. Crim. P. 32.2(a)(1)-(2).

¶16 Accordingly, although we grant Baker’s petition for review, we deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge